Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Planet Earth Foundation d/b/a Planet Earth Media

Petitioner

v.

~~New York~~ University

Respondent

PETITION FOR WRIT OF CERTIORARI

March 22, 2006

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred when it failed to hold as matter of law that it is copyright infringement to display a copyrighted work in its entirety for a commercial purpose, in conflict with the holdings of this Court.

2. Whether the Court of Appeals for the Second Circuit created a conflict of law with the Court of Appeals for the Ninth Circuit in holding that it is not copyright infringement to display a copyrighted work in its entirety for a commercial purpose.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were Petitioners Planet Earth Foundation d/b/a Planet Earth Media, and Lisa Blume and John Keith Blume a/k/a Keith Blume,[1] and Respondent New York University. Petitioner is a not-for profit corporation organized under the laws of Washington. It has no corporate parents, nor has it issued shares or securities.

[1] Lisa Blume and Keith Blume were named as parties in the District Court but no relief was granted against them.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. The District Court's Judgment 4

II. The Second Circuit's Determination 5

REASONS FOR GRANTING THE WRIT 5

I. Certiorari Should Be Granted Because There Was Copyright Infringement As A Matter Of Law By Displaying An Entire Copyrighted Work For A Commercial Purpose. 5

II. Certiorari Should Be Granted Because The Second Circuit's Decision Created A Conflict With A Ninth Circuit Decision That There Is Copyright Infringement As A Matter Of Law By Displaying An Entire Copyrighted Work For A Commercial Purpose 7

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Feist Publications, Inc. v. Rural Tel. Serv. Co.,
499 U.S. 340 (1991) 6

Harper & Row Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985) 7

Hustler Magazine, Inc. v. Moral Majority, Inc.,
796 F.2d 1148 (9th Cir. 1986) 7

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 6

Statutes

17 U.S.C. § 106 ..... 1, 6

17 U.S.C. § 107 ..... 2, 3, 5, 6

28 U.S.C. § 1254 1

Rules

Fed. R. Civ. P. 50 ..... 3, 4

Fed. R. Civ. P. 59 ..... 3, 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is unreported and set forth in the Appendix at A-6. The judgment of the United States District Court for the Southern District of New York is set forth in the Appendix at A-2. An order denying a motion for judgment as a matter of law and/or for a new trial without opinion of the United States District Court for the Southern District of New York is unreported and set forth in the Appendix at A-4.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was issued on December 23, 2005. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

17 U.S.C. § 106(5):

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * *

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion

picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

* * *

STATEMENT OF THE CASE

Respondent New York University ("NYU") brought a breach of contract action against petitioner Planet Earth Foundation d/b/a Planet Earth Media ("Planet Earth"), and other claims against Planet Earth, Lisa Blume and John Keith Blume a/k/a Keith Blume which were dismissed by the District Court or withdrawn, in which Planet Earth counterclaimed for breach of contract and copyright infringement. The breach of contract and copyright infringement claims arose from a 2002 agreement ("Agreement") entered into between NYU and Planet Earth.

The District Court had jurisdiction over the underlying action under 28 U.S.C. §§ 1331, 1332 and 1338. The case was tried to a jury from January 10 through January 18, 2005. At the conclusion of the trial, the jury returned a verdict finding that Planet Earth had breached the Agreement. The jury verdict also found that NYU had not breached the Agreement[2] and that NYU had not infringed Planet Earth's copyright in a television spot created by Planet Earth pursuant to the Agreement. On February 15, 2005, the District Court entered Judgment against Planet Earth amounting to a portion of what was paid under the Agreement.

After entry of Judgment, Planet Earth brought a motion for judgment as a matter of law or, in the alternative, for a new trial pursuant to Rules 50 and 59, Fed. R. Civ. P., because the evidence at trial did not support the jury's finding that there was no copyright infringement when NYU displayed the entire television spot at a fundraiser. On March 8, 2005, the District Court issued an Order without opinion summarily denying Planet Earth's post-trial motion. Planet Earth timely appealed the Judgment to the Court of Appeals for the Second Circuit.

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court. The Court found that the evidence supported the jury's finding of fair use under the four-factored analysis prescribed by 17 U.S.C. § 107, noting that whether NYU's display of copyrighted material at a fundraiser was of a commercial nature was an issue for the jury to decide.

In affirming the District Court's judgment, the Second Circuit in effect ruled that it is not copyright infringement to display a copyrighted work in its entirety for a commercial purpose, which is in conflict with the holdings of this Court and the Court of Appeals for the Ninth Circuit.

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[2] The breach of contract issue is not before this Court.

I. The District Court's Judgment

NYU displayed Planet Earth's copyrighted work in its entirety for commercial purposes without Planet Earth's authorization.

Under the Agreement, Planet Earth created a television spot called "Remember", the subject of the copyright infringement counterclaim, as part of a public service campaign for NYU's Child Study Center in an effort to increase public awareness about child mental health issues in the wake of September 11th. Planet Earth received a copyright registration from the Register of Copyrights, Reg. No. PA-1-124-660, which covers the "Remember" television spot.

NYU displayed the "Remember" television spot in its entirety without Planet Earth's authorization and raised $2.3 million gross in donations at NYU's 2002 Child Advocacy Awards Dinner. There was no dispute at trial that at least some of that money was given to NYU by donors after the dinner. There was also no dispute at trial that the "Remember" spot was not shown to educate the public about children's mental health issues, but rather to show donors the work being done by the Child Study Center, so that donors would contribute money to NYU. NYU's use of the "Remember" spot was purely for commercial purposes.

The jury found no copyright infringement but made no finding concerning fair use. Planet Earth filed post-trial motions under Rules 50 and 59, F.R.Civ.P., because as a matter of law, there could be no fair use and, therefore, there must be copyright infringement since NYU displayed the television spot for commercial purposes without Planet Earth's authorization. Those motions, however, were summarily denied without opinion by the District Court.

II. The Second Circuit's Determination

The Second Circuit reviewed *de novo* the District Court's denial of Planet Earth's Rule 50 motion and reviewed for abuse of discretion the denial of Planet Earth's Rule 59 motion. The Second Circuit affirmed the District Court's judgment that there was no copyright infringement. Specifically, the Second Circuit held that the evidence at trial supported a jury finding of fair use under the four-factored analysis prescribed by 17 U.S.C. § 107, although there had been no such finding. The Second Circuit further held that whether NYU's display of copyrighted material at its fundraiser was of a commercial nature was an issue for the jury to decide, although there had been no such finding. This holding is contrary to the holdings of this Court and the Court of Appeals for the Ninth Circuit that displaying a copyrighted work in its entirety for a commercial purpose is as a matter of law copyright infringement.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because There Was Copyright Infringement As A Matter Of Law By Displaying An Entire Copyrighted Work For A Commercial Purpose.

The District Court's and Court of Appeals' decisions in this case drive a wedge into the heart of the media and communications industries. They allow one to use an entire copyrighted work for a commercial purpose without compensation to the copyright owner. Thus, the issue presented is of substantial importance to authors, artists and businesses.

In this case, to succeed on its claim of copyright infringement, Planet Earth only needed to establish that it owned the copyright in the work and that NYU displayed it

without Planet Earth's authorization or consent. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). There was no dispute at trial that Planet Earth owned a copyright in the "Remember" television spot. As the copyright owner, Planet Earth has the exclusive right to reproduce, distribute, and publicly display copies of the work. 17 U.S.C. § 106. Furthermore, there was no dispute at trial that Planet Earth never authorized NYU to display the copyrighted work at its fundraiser. Planet Earth made out a *prima facie* case of copyright infringement.

To rebut this *prima facie* case of copyright infringement, NYU had to prove a fair use defense. Section 107 of the Copyright Act provides that, notwithstanding the provisions of sections 106, the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. 17 U.S.C. § 107. In addition, section 107 specifies four factors courts must consider in determining whether the use in a particular case is a fair use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. The four factors favored Planet Earth as supported by evidence at trial, and the Second Circuit erred by not finding copyright infringement as a matter of law.

If a work is used for a commercial purpose, the use is presumptively unfair. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 449-451 (1984). The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material

without paying the customary price. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985). The undisputed facts showed that NYU's fundraiser had the commercial purpose of raising money for NYU, and that NYU received money in connection with the fundraiser after displaying the "Remember" television spot at the fundraiser. There was no basis for the jury to find that the use was not commercial. The unauthorized display of an entire copyrighted work at a fundraiser for monetary gain, even by a not-for-profit organization like NYU, is for a commercial purpose. Without contrary evidence that the use was fair, NYU's use of Planet Earth's entire copyrighted television spot at the fundraiser constituted infringement. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir. 1986). The lower courts' failure to recognize NYU's infringing conduct as such was contrary to law and to the public interest.

II. Certiorari Should Be Granted Because The Second Circuit's Decision Created A Conflict With A Ninth Circuit Decision That There Is Copyright Infringement As A Matter Of Law By Displaying An Entire Copyrighted Work For A Commercial Purpose.

In Moral Majority, the Ninth Circuit held that the use of copyrighted material to raise money is presumptively unfair, and therefore constitutes infringement. In that case, the Court held that the presumption of unfairness was overcome because the copyrighted work was used to rebut a personal attack and to make a political comment about the nature of the material. Id. at 1153. In Moral Majority, the defendant used the copyrighted material to make a statement about pornography, the publisher of the material and the content of the copyrighted material itself. The Court held that "[t]here was no attempt to palm off the parody as that of the Defendants." Id.